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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND JOSEPH BENCOMA III, Defendant and Appellant.	E069466 (Super.Ct.No. MBCRF2016600141) OPINION

APPEAL from the Superior Court of Inyo County. Brian Lamb, Judge. Conditionally reversed with directions.

Christopher A. Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

After defendant and appellant, Raymond Joseph Bencoma III's, girlfriend, C.F., told the police defendant had assaulted her, four law enforcement officers went to a mobile home where the assault reportedly occurred. It was after 3:00 a.m. and a moonless pitch-black night. The four investigating officers quietly approached the mobile home on foot in the dark. The officers noticed something move and they turned on their flashlights, which suddenly illuminated defendant standing nearby, pointing a handgun at the officers. One of the officers shot defendant twice in the head.

Defendant was charged with four counts of assault with a firearm on a peace officer, possession of a firearm by a felon, possession of ammunition by a felon, and receiving stolen property. After a third jury trial, defendant was convicted of four lesser counts of assault with a firearm (Pen. Code, § 245, subd. (d)(1); counts 1-4),[1] possession of a firearm by a felon (§ 29800, subd. (a)(1); count 5), and possession of ammunition by a felon (§ 30305, subd. (a)(1); count 6). During a bifurcated court trial, the court found true allegations defendant suffered three prior serious felony convictions and three strike convictions. The court sentenced defendant to an indeterminate prison term of 100 years to life, plus a consecutive determinate term of 41 years four months.

Defendant contends the trial court abused its discretion by precluding defense counsel from reading to the jury news articles reporting that a mountain lion was spotted

[1] Unless otherwise noted, all statutory references are to the Penal Code.

in the area a month before the charged offenses. Defendant further contends the trial court violated his Sixth Amendment right to a jury trial by finding that his prior conviction for vehicular manslaughter qualified as a prior serious felony conviction. In addition, defendant argues this court must remand this case under Senate Bill No. 1393 (2017-2018 Reg. Sess.) (SB 1393) to allow the trial court to exercise its discretion to strike defendant's prior serious felony enhancements. Defendant also argues section 1001.36 applies retroactively and therefore this court must reverse his conviction and remand the matter to the trial court for a hearing on whether he qualifies for mental health diversion under section 1001.36. Finally, defendant requests this court to examine the *Pitchess*[2] records reviewed by the trial court.

We conclude the trial court did not err in denying *Pitchess* discovery and reject defendant's other contentions, with two exceptions. First, we hold section 1001.36 applies retroactively to this case, even though defendant was already tried and convicted when section 1001.36 became effective. We therefore conditionally reverse the judgment, to allow the trial court to conduct a hearing to determine whether defendant is eligible for pretrial mental health diversion under section 1001.36. If the trial court concludes that defendant is not eligible for diversion or defendant fails to complete diversion, his conviction and sentence shall be reinstated. Second, we hold that, in the event defendant's conviction and sentence are reinstated, the trial court is directed under SB 1393 to exercise its discretion to determine whether to strike one or more of

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

defendant's prior serious felony enhancements pursuant to sections 667, subdivision (a) and 1385, subdivision (b). The judgment is otherwise affirmed.

II.

FACTS

Around 3:00 a.m., on August 26, 2016, Deputy Sheriff Bradley responded to a call reporting a prowler at a residence on Tibec Lane in Bishop. Police Officer Hohenstein provided backup. The two officers looked around the residence, but did not find the prowler. As the officers returned to their patrol cars, C.F. emerged from the bushes and approached the officers. C.F. appeared drunk. C.F. told the officers her boyfriend, defendant, had beaten and bitten her. The incident occurred at the nearby home of P.P., located on Winuba Lane in Bishop. C.F. reported that defendant had been drinking.

Right after the encounter with C.F., Deputy Bradley and Officer Hohenstein investigated C.F.'s domestic violence allegations. During the officers' previous encounters with defendant, he had been uncooperative. By the time Deputy Bradley, Officer Hohenstein, and two additional officers, California Highway Patrol (CHP) Officers Rader and Swain, arrived at the Winuba residence, it was after 3:00 a.m., and was a moonless pitch-black night.

As the officers cautiously approached the residence, they turned off their vehicles' headlights, and only used their taillights and amber front lights. The officers knew defendant did not live there but had been there on multiple occasions. They also knew defendant had a history of domestic violence and hostility toward law enforcement

officers. After parking in front of the property, the four officers walked up the dirt driveway toward P.P.'s mobile home. The officers did not use their flashlights or announce their presence. P.P.'s mobile home was dark inside and outside.

As the officers silently walked up the driveway, a barking dog charged at them. Officer Hohenstein hit the dog with the butt of his shotgun and the dog ran off. When the dog returned, another officer sprayed it with pepper spray, which made a hissing sound. As the officers got closer to the mobile home, they noticed the glass sliding door was open.

Suddenly, Officer Hohenstein and Deputy Bradley saw something move and turned on their flashlights. The officers saw defendant standing nearby pointing a gun at them. Deputy Bradley fired seven shots at defendant. Two of the shots struck defendant in the head. Defendant dropped his loaded gun and fell to the ground. Defendant did not say anything during the incident.

Three days after defendant was shot, Sheriff's Detective Johnston interviewed defendant at the hospital. Defendant said he did not remember arguing with C.F. the night he was shot and did not remember seeing the police or the police shooting him. Defendant believed he was in the hospital because he had been beaten up.

A little over a month after the shooting, defendant was recorded making a telephone call from the county jail. During the call, defendant admitted he had seen the officers arrive. Defendant stated that after C.F. left, "I seen the goddamn cops . . . 'cause I seen 'em. I thought, ah, f---." Defendant also said during the call, "I see those f---ers

driving around with their f---in' lights off. . . . [¶] [A]nd then I can f---in' hear them starting to walk up the f---in' road."

III.

THE TRIAL COURT PROPERLY PROHIBITTED

DEFENSE COUNSEL MENTIONING NEWS ARTICLES

DURING CLOSING ARGUMENT

Defendant contends the trial court abused its discretion in declining to allow defense counsel to refer to three news articles during closing argument. The news articles, dated July 21, 2016, July 22, 2016 and July 26, 2016, reported a mountain lion sighting in Bishop. Defendant argues the articles were relevant to his defense theory that he thought a wild animal, such as a mountain lion, was approaching him in the dark, instead of the four officers. Defendant asserts his trial attorney therefore should have been able to mention the articles because the articles were "relat[ed] to matters of common knowledge or substantiated illustrations of common experience," relevant to showing his intent and mental state. (*People v. West* (1983) 139 Cal.App.3d 606, 611.) We disagree.

A. *Procedural Background*

Before closing argument, defendant filed a motion to read during closing argument, three news articles reporting the sighting of a mountain lion. The copies of the articles, attached to the motion, included (1) a California Department of Fish and Wildlife news release on July 21, 2016, (2) a news post on July 26, 2016, referencing the

Department of Fish and Wildlife news release, and (3) an Inyo County Sheriff's Facebook post on July 22, 2016, referencing the Department of Fish and Wildlife news release.

Defendant argued in his motion that "the incidence of mountain lions in and around the Eastern Sierra is a matter of common knowledge and experience. Therefore, defense counsel must be permitted to read from the three attached articles." The court denied defendant's motion, without prejudice to defense counsel "making reference to the general knowledge about the various wildlife that . . . may occasionally be encountered in our rural county."

During closing argument, defense counsel argued that defendant did nothing "to indicate he knew he was pointing a gun at a human being." Defense counsel asserted that a reasonable person would have had "no reason to know that a human being, let alone law enforcement, was present." There was a hissing sound from an officer spraying pepper spray at a dog. Defense counsel noted: "There are a lot of animals in Bishop that can make hissing sounds." One of the officers was "essentially down on all four[s] at the height of a wild animal" when defendant pointed his gun at the officer. It was pitch-black, and the officers did "nothing to indicate they're human beings." "[W]hen a dog attacks a wild animal, you expect to hear hissing or fighting," but when a dog attacks a human "you expect a human to yell." Defendant "just heard a noise that the officer described as a hissing sound. [¶] . . . [W]e live in mountain country. There are mountain lions in Bishop. There are Bob cats[*sic*]. There are coyotes. [¶] He hears a []

hissing sound and he points a firearm in the direction of that sound. That's not a[n] assault."

Defense counsel argued an element of the assault offense was missing because there was "no reason a reasonable person in that situation . . . would understand or realize that they were likely pointing a firearm at a human being, much less law enforcement." During rebuttal, the prosecutor acknowledged "there are animals. It's rural California. There are skunks, there are raccoons, [there] are snakes, there are coyotes, [and] mountain lions." The prosecutor argued that, nevertheless, there was evidence that defendant had identified the officers as people before assaulting them.

B. *Applicable Law*

An attorney's summation to the jury generally "'must be based solely upon those matters of fact of which evidence has already been introduced or of which no evidence need ever be introduced because of their notoriety as judicially noticed facts.' [Citations.] He may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature. [Citations.]" (*People v. Love* (1961) 56 Cal.2d 720, 730; accord, *People v. West, supra,* 139 Cal.App.3d at p. 611.) However, "'he may not dwell on the particular facts of unrelated, unsubstantiated cases.'" (*People v. West, supra,* at p. 611.)

Whether the news articles should have been read to the jury is a matter that is addressed to the sound discretion of the trial court. In exercising that discretion, the trial court is required to read the news articles and consider whether they relate "to matters of

common knowledge or substantiated illustrations of common experience, whether the article is relevant to the case and whether the article may confuse the issues in the case." (*People v. West*, *supra*, 139 Cal.App.3d at p. 611; see also *People v. Woodson* (1964) 231 Cal.App.2d 10, 15-16.)

C. *Analysis*

The record shows that the trial court read the articles and concluded the articles were not relevant and contained specific facts, rather than merely matters of common knowledge. The trial court therefore properly denied defense counsel license to read during closing argument the news articles reporting on a specific mountain lion sighting in Bishop a month before the charged crimes. The trial court reasonably concluded that such hearsay material likely would confuse the jury with irrelevant facts, unsupported by any evidence introduced during the trial. (*People v. West*, *supra*, 139 Cal.App.3d at p. 611.)

The mountain lion sighting was irrelevant to the issue of whether defendant knew that people, rather than a wild animal, were approaching him, because the mountain lion sighting occurred a month before the charged crimes and there was no evidence the mountain lion was seen at or near the scene of the charged crimes. There was also no evidence introduced at trial that defendant read the articles or actually believed a mountain lion was present when he pointed his gun at the officers.

Furthermore, the articles contained specific facts relating to the mountain lion sighting, rather than merely general information about wildlife in the area. In addition,

the specific facts reported in the article were not based on any evidence presented at trial. Therefore, referring to the articles during closing argument risked encouraging the jury to speculate on defendant's state of mind in the absence of any supporting evidence. The trial court thus did not abuse its discretion in denying defendant's motion to read from the news articles during closing argument.

Even if there was error in prohibiting defense counsel from reading from the news articles, it was harmless because defense counsel was permitted to argue that there was wildlife in the area and that defendant pointed his gun at the officers believing them to be a wild animal. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) It is not reasonably probable that reading the news articles to the jury during closing argument would have changed the jury's verdict. (*Ibid.*)

IV.

PITCHESS RECORDS REVIEW

Defendant requests this court to examine the personnel records of the officers involved in the shooting in this case. The records were reviewed by the trial court in camera, after defendant filed *Pitchess* motions requesting the officers' personnel records.

A. *Procedural Background*

Before defendant's trial, he filed three *Pitchess* motions (collectively referred to as a *Pitchess* motion) requesting the personnel records of Deputy Sheriff Bradley, Police Officer Hohenstein, and CHP Officers Rader and Swain. The People joined defendant's *Pitchess* motion. After the trial court found defendant had made a threshold showing

required for court review of the officers' personnel records, the trial court reviewed the officers' personnel records in camera on December 8, 2016. Following the in camera records review, the trial court found there were no documents discoverable under *Pitchess*. The trial court sealed the records of the in camera hearing. Because defendant is unable to determine whether the trial court erred in denying *Pitchess* discovery, he requests this court to conduct an independent review of the sealed hearing records to determine whether there was any error or abuse of discretion by the trial court. The People do not object on appeal to this court reviewing the sealed records to ensure that the trial court properly determined that no records were required to be produced.

B. *Law Applicable to* Pitchess *Motions*

In *Pitchess*, the California Supreme Court held that a criminal defendant can obtain discovery of certain law enforcement personnel records upon a sufficient showing of good cause. (*Pitchess, supra,* 11 Cal.3d at pp. 537-540.) "In 1978, the California Legislature codified the privileges and procedures surrounding what had come to be known as '*Pitchess* motions' . . . through the enactment of Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81 (*Santa Cruz*); accord, *Riverside County Sheriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 624, 630 (*Stiglitz*).) Those sections create a statutory scheme making law enforcement personnel records confidential and subject to discovery only through the procedure set out in the Evidence Code. (*Stiglitz, supra,* at p. 630; *Santa Cruz, supra,* at pp. 81-82.)

Section 832.7, subdivision (a) provides, in part: "[T]he personnel records of peace officers and custodial officers and records maintained by any state or local agency pursuant to [Penal Code] [s]ection 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to [s]ections 1043 and 1046 of the Evidence Code."

Evidence Code section 1043, subdivision (a) reads, in part: "'*In any case* in which discovery or disclosure is sought of peace or custodial officer personnel records . . . , the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body . . . ." Evidence Code section 1043 sets out the initial good cause showing an applicant must make to initiate the discovery process. If that showing is successful, Evidence Code section 1045 governs the conduct of the resultant hearing in camera. (*Stiglitz, supra*, 60 Cal.4th at p. 631.) The records requested must be shown "relevant to the subject matter involved in the pending litigation." (Evid. Code, § 1045, subd. (a).)

Certain categories of information are not discoverable, including: "(1) complaints more than five years old, (2) the 'conclusions of any officer investigating a complaint . . .' and (3) facts which are 'so remote as to make disclosure of little or no practical benefit.' ([Evid. Code] § 1045, subd. (b).)" (*Santa Cruz, supra*, 49 Cal.3d at p. 83; in accord, *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 31; *Stiglitz, supra*, 60 Cal.4th at pp. 631-632.) Although complaints involving conduct occurring more than five years before the charged crime are excludable under Evidence Code

section 1045, such complaints nevertheless must be disclosed if they contain facts that are exculpatory under *Brady v. Maryland* (1963) 373 U.S. 83. (*City of Los Angeles v. Superior Court*, *supra*, at pp. 9-10.)

The relatively low threshold for discovery embodied in Evidence Code section 1043 is offset by protective provisions in Evidence Code section 1045, which "(1) explicitly 'exclude from disclosure' certain enumerated categories of information ([Evid. Code] § 1045, subd. (b)); (2) establish a procedure for in camera inspection by the court prior to any disclosure ([Evid. Code] § 1045, subd. (b)); and (3) issue a forceful directive to the courts to consider the privacy interests of the officers whose records are sought and take whatever steps 'justice requires' to protect the officers from 'unnecessary annoyance, embarrassment or oppression.' ([Evid. Code] § 1045, subds. (c), (d) & (e).)" (*Santa Cruz*, *supra*, 49 Cal.3d at pp. 83-84; in accord, *City of Los Angeles v. Superior Court*, *supra*, 29 Cal.4th at p. 31.)

The trial court is vested with broad discretion when ruling on a *Pitchess* motion seeking discovery of police officer personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.) We review a trial court's decision concerning the discovery of material contained in officer personnel records for an abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

In the seminal *Pitchess* case, *People v. Mooc* (2001) 26 Cal.4th 1216, 1221 (*Mooc*) our high court held that the trial court erred in failing to make a record of the portion of the personnel file it had considered when denying the defendant's *Pitchess*

motion. (*Mooc*, *supra*, at p. 1228.) The *Mooc* court concluded that, without evidence in the record indicating what the trial court reviewed, the defendant was unable to obtain meaningful appellate review of the in camera *Pitchess* ruling. (*Mooc*, *supra*, at p. 1228.) The *Mooc* court also held that the Court of Appeal erred in ordering that the officer's entire personnel file be provided to the Court of Appeal for review. (*Id*. at p. 1221.) The custodian of records was only required to provide those documents that were potentially responsive to the defendant's specific request. (*Id.* at p. 1230.)

The *Mooc* court further held that, when there is evidence that the custodian of records has failed to provide the appellate court with the same records provided to the trial court, the Court of Appeal should order augmentation of the record by remanding the case to the trial court to allow the trial court to settle the record as to those documents it examined when ruling on the *Pitchess* motion. (*Mooc*, *supra*, 26 Cal.4th at p. 1221.)

The court explained in *Mooc* that "[t]he trial court's failure to make a record of the documents it reviewed in camera set the wheels in motion for the present dispute. Without some evidence in the record indicating what the trial court reviewed, defendant was unable to obtain meaningful appellate review of the court's decision not to disclose any evidence in response to his *Pitchess* motion. Had the trial court retained copies of the documents it examined before ruling on the *Pitchess* motion, made a log of the documents it reviewed in camera, or just stated for the record what documents it examined (such transcript, of course, to be sealed), the Court of Appeal could have itself reviewed those documents (or augmented the record to include those documents) and

determined whether the trial court had abused its discretion in refusing to disclose any of [the officer's] personnel records." (*Mooc, supra*, 26 Cal.4th at p. 1228.)

C. *Analysis*

Based on our independent review of the sealed record, which includes the trial court hearing transcript of the in camera *Pitchess* hearing on December 8, 2016, we conclude the trial court properly considered whether any of the personnel records of Deputy Sheriff Bradley, Police Officer Hohenstein, and CHP Officers Rader and Swain were discoverable. The records were adequately described and discussed on the record, and or produced during the in camera hearing for purposes of this court reviewing whether the trial court erred in not releasing any of the requested documents. We conclude, as did the trial court and custodian of records, that there were no records constituting relevant discoverable *Pitchess* material.

Because the sealed record demonstrates there was no disclosable evidence, we conclude the trial court did not abuse its discretion in declining to release any of the confidential records of Deputy Sheriff Bradley, Police Officer Hohenstein, and CHP Officers Rader and Swain. Defendant therefore is not entitled to the release of any of these officers' confidential records.

V.

DEFENDANT'S VEHICULAR MANSLAUGHTER PRIOR

Defendant contends the trial court violated his Sixth Amendment right to a jury trial by finding that his prior vehicular manslaughter conviction qualified as a prior serious felony conviction.

A. *Procedural Background*

During a bifurcated court trial, the court found true defendant's three prior strike allegations (§ 667, subds. (b)-(i)) and three prior serious felony conviction enhancements (§ 667, subd. (a)(1)). During the court trial, the People submitted a packet of defendant's criminal records, which included an abstract of judgment showing defendant pled guilty and was convicted of violating section 192, subdivision (c)(1) (vehicular manslaughter) in 1996. Defense counsel asserted that in order for the court to find defendant's 1996 vehicular manslaughter conviction was a serious felony prior, evidence was required showing the jury found defendant personally inflicted great bodily injury (GBI) during the commission of the vehicular manslaughter offense.

After finding true the prior strike allegations (strikes) and prior serious felony convictions, the trial court deferred until the sentencing hearing, deciding whether defendant's priors qualified as prior serious felony conviction enhancements. Defendant filed supplemental briefing again arguing that the trial court could not find that defendant's 1996 vehicular manslaughter conviction qualified as a prior serious felony conviction because such a finding required the court to make a factual determination that

defendant personally inflicted GBI in the commission of the vehicular manslaughter offense.

The People filed a request for judicial notice of the vehicular manslaughter felony complaint and transcript of the plea proceedings during which defendant pled no contest to vehicular manslaughter in 1996. The complaint stated that defendant was charged with killing a 13-year-old girl, with gross negligence, by unlawfully driving a vehicle. The plea hearing transcript states that defendant admitted "'evading officers, traveling at unsafe speed and driving on the wrong side of the road.'" When entering a plea of no contest, defendant stated "[y]es" when the court asked if "you did unlawfully kill a human being . . . with gross negligence as a proximate result of the commission . . . of an unlawful act, various violations of the Vehicle Code pertaining to evading officers, traveling at unsafe speed and driving on the wrong side of the road."

During the sentencing hearing, defense counsel once again argued that defendant's 1996 vehicular manslaughter conviction did not qualify as a prior serious felony conviction because there was no jury finding and defendant did not plead to personally inflicting GBI during the crime. Defense counsel asserted that the trial court could not make a factual finding on the GBI element because defendant had a right to a jury determination of the elements of the prior serious felony conviction.

The trial court nevertheless found that, as to defendant's vehicular manslaughter prior, defendant personally inflicted GBI. The court therefore concluded the People had

met their burden of establishing that defendant's 1996 vehicular manslaughter conviction was a serious felony.

B. *Applicable Law*

Under section 667, subdivision (a)(1), a defendant who commits a felony offense after a prior conviction for a "serious felony," as defined in section 1192.7, is subject to a five-year sentence enhancement. Section 1192.7 does not include in its list of serious felonies vehicular manslaughter. However, subdivision (c)(8) of section 1192.7 includes as a serious felony "any felony in which the defendant personally inflicts [GBI] on any person, other than an accomplice." (§ 1192.7, subd. (c)(8).) Thus, under subdivision (c)(8) of section 1192.7 and section 1192.8, subdivision (b), vehicular manslaughter (§ 192, subd. (c)(1)) is a serious felony if, in the commission of the crime, the defendant personally inflicts GBI on any person other than an accomplice. (*People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1694; § 1192.8.)

In determining whether a defendant's prior vehicular manslaughter conviction qualifies as a serious felony, the trial court may only consider factual findings by a jury rendering the prior guilty verdict or facts admitted by a defendant when entering his plea on the vehicular manslaughter charge. (*People v. Gallardo* (2017) 4 Cal.5th 120, 134.) As explained by our high court: "'The Sixth Amendment contemplates that a jury—not a sentencing court—will find' the facts giving rise to a conviction, when those facts lead to the imposition of additional punishment under a recidivist sentencing scheme. [Citation.] This means that a sentencing court may identify those facts it is 'sure the jury . . . found'

in rendering its guilty verdict, or those facts as to which the defendant waived the right of jury trial in entering a guilty plea. [Citation.] But it may not 'rely on its own finding' about the defendant's underlying conduct 'to increase a defendant's maximum sentence.' [Citation.]" (*Ibid.*)

Thus, as the court in *Gallardo* held, a court considering whether to impose a sentence enhancement based on a prior qualifying conviction "may not determine the 'nature or basis' of the prior conviction based on its independent conclusions about what facts or conduct 'realistically' supported the conviction. [Citation.] That inquiry invades the jury's province by permitting the court to make disputed findings about 'what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct.' [Citation.] The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea." (*People v. Gallardo*, *supra*, 4 Cal.5th at p. 136.)

C. *Analysis*

Defendant argues the trial court engaged in a form of factfinding that strayed beyond the bounds of the Sixth Amendment by finding that his vehicular manslaughter prior conviction qualified as a serious felony. We disagree.

During defendant's no contest plea to vehicular manslaughter, he admitted that he unlawfully killed the victim with gross negligence as a proximate result of defendant's commission of an unlawful act, which included "various violations of the Vehicle Code

pertaining to evading officers, traveling at unsafe speed and driving on the wrong side of the road." Defendant's admission of these facts when entering his no contest plea to vehicular manslaughter was sufficient to support the trial court's finding that defendant personally inflicted GBI on the victim. Based on facts defendant admitted during his plea, there were sufficient facts supporting the trial court's determination that defendant's prior vehicular manslaughter conviction qualified as a serious felony.

VI.

DISCRETION TO STRIKE PRIOR SERIOUS FELONY CONVICTIONS

Defendant contends that SB 1393 requires this case to be remanded so that the trial court can exercise its newly authorized discretion to strike defendant's prior serious felony convictions under recently amended sections 667 and 1385. We agree SB 1393 applies retroactively and that remand is necessary so the court may exercise its discretion and decide whether to strike the prior serious felony enhancements.

At the time of defendant's sentencing hearing on November 2, 2017, section 1385 included the following provision: "(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667." This provision was deleted from section 1385 by SB 1393, enacted on September 30, 2018, and effective January 1, 2019. As amended, section 1385, subdivision (b) gives the trial court discretion to dismiss or strike a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) The trial court therefore is no longer prohibited from striking prior serious felony

convictions during sentencing.

Defendant argues SB 1393 applies retroactively to all cases in which the trial court imposed a five-year enhancement for a prior serious felony conviction, provided the judgment was not final when SB 1393 became effective on January 1, 2019. Citing *People v. Garcia*, *supra*, 28 Cal.App.5th at page 972, the People acknowledge that SB 1393 "may" apply retroactively to defendant. This is because, "[w]hen an amendatory statute either lessens the punishment for a crime *or*, as [SB] 1393 does, '"vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,"' it is reasonable for courts to infer, absent evidence to the contrary and as a matter of statutory construction, that the Legislature intended the amendatory statute to retroactively apply to the fullest extent constitutionally permissible—that is, to all cases not final when the statute becomes effective." (*People v. Garcia*, *supra*, at p. 972.)

The People argue that, even assuming SB 1393 applies retroactively to defendant's case, remand is unwarranted because such a hearing would be futile and unnecessary. The People reason that, given the trial court's denial of defendant's *Romero* motion (*People v. Superior Court (Romero*) (1996) 13 Cal.4th 497), remand is unwarranted because there is no reason to believe that the trial court would exercise its newly granted discretion to strike the prior serious felony enhancements. We disagree.

SB 1393 is similar to Senate Bill No. 620 (2017-2018 Reg. Sess.) (SB 620), which amended section 12022.53, subdivision (h) to provide that "[t]he court may, in the interest of justice pursuant to [s]ection 1385 and at the time of sentencing, strike or

dismiss an enhancement otherwise required to be imposed by this section." (See also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424 (*McDaniels*); *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079.) In *McDaniels*, the court held that a remand for resentencing under SB 620 was required "unless the record show[ed] that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*McDaniels*, *supra*, at p. 425.) In other words, "if '"the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required."'" (*Ibid.*; see also *People v. Superior Court (Romero*), *supra*, 13 Cal.4th 497, 530, fn. 13.) Here, the record does not show that the trial court would not have exercised its discretion, even if it believed it could do so.

We recognize that the trial court's sentencing choices and statements at sentencing suggest it might not exercise its discretion to strike defendant's prior serious felony enhancements. However, this does not foreclose the possibility the trial court would have stricken one or more of defendant's prior serious felony convictions for sentencing purposes if it had the discretion to do so. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896. Accordingly, remand is appropriate in this case to allow the trial court to exercise its discretion to determine whether to strike one or more of defendant's prior serious felony enhancements under SB 1393.

VII.

RETROACTIVE APPLICATION OF SECTION 1001.36

Defendant contends section 1001.36, which allows pretrial mental health diversion, applies retroactively to his case. We agree.

A. *Pretrial Diversion*

Generally, pretrial diversion suspends criminal proceedings for a prescribed time period, subject to specified conditions. (§§ 1000-1000.1 [drug offense diversion]; 1001.60-1001.62 [bad check diversion]; 1001.70 [parental diversion]; 1001.80 [military diversion]; 1001.81 [repeat theft offense diversion].) Criminal charges normally are dismissed if a defendant successfully completes a diversion program. (§§ 1001.9, 1001.33, 1001.55, 1001.74-1001.75.)

Effective June 27, 2018, the Legislature enacted section 1001.36, which authorizes pretrial diversion for qualifying defendants with mental health disorders. Section 1001.36 defines "'pretrial diversion' [as] the *postponement of prosecution*, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged *until adjudication* . . . ." (§ 1001.36, subd. (c), italics added.)

Section 1001.36 authorizes the trial court to grant pretrial mental health diversion if the following criteria are satisfied: (1) the trial court is satisfied, based on evidence from a qualified mental health expert, that the defendant suffers from a recognized mental disorder; (2) the trial court is satisfied the defendant's disorder played a significant role in the commission of the charged offense; (3) in the opinion of a qualified mental health

expert, the defendant's mental health symptoms, which motivated criminal behavior, would respond to mental health treatment; (4) the defendant consents to diversion and waives his right to a speedy trial; (5) the defendant agrees to comply with treatment for the disorder as a condition of diversion; and (6) the trial court is satisfied the defendant "will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).)

In addition to finding the defendant meets these six requirements, the trial court must also find that the recommended inpatient or outpatient mental health treatment program will meet the defendant's specialized mental health treatment needs. (§ 1001.36, subd. (c)(1)(A).) A defendant's criminal proceedings may be diverted no longer than two years. (§ 1001.36, subd. (c)(1)(B)(3).) If the defendant performs unsatisfactorily in diversion, including committing additional crimes, the court may reinstate criminal proceedings. (§ 1001.36, subd. (d).) If the defendant performs satisfactorily in diversion, at the end of the diversion period, the court shall dismiss the defendant's criminal charges. (§ 1001.36, subd. (e).)

B. *Prospective Application Presumption and Inference of Retroactive Intent*

The parties dispute whether section 1001.36 applies retroactively to defendant, whose appeal was pending when the statute took effect. Generally, we presume laws apply prospectively, rather than retrospectively. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307 (*Lara*); see also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1209.) Under section 3, a newly enacted Penal Code statute is presumed to operate

prospectively. Section 3 provides that no part of the Penal Code "is retroactive, unless expressly so declared." (§ 3.) This statute creates a strong presumption of prospective application, codifying the principle that, "'in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the [lawmakers] . . . must have intended a retroactive application.' [Citations.] Accordingly, '"a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective."'" (*People v. Brown* (2012) 54 Cal.4th 314, 324; accord, *People v. Buycks* (2018) 5 Cal.5th 857, 880.)

"'But this presumption against retroactivity is a canon of statutory interpretation rather than a constitutional mandate. [Citation.] Therefore, the Legislature can ordinarily enact laws that apply retroactively, either explicitly or by implication. [Citation.] In order to determine if a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature . . .'" (*Lara, supra,* at p. 307, quoting *People v. Vela* (2017) 11 Cal.App.5th 68, 72-73.)[3]

Normally, when there is no savings clause and a statute decreases punishment, it can be inferred the Legislature intended retroactive application, unless the statute states otherwise. (*In re Estrada* (1965) 63 Cal.2d 740, 745 (*Estrada*); *Lara, supra,* 4 Cal.5th at p. 307.) Such a statute decreasing punishment may thus be applied retroactively to acts

[3] Review granted July 12, 2017, S242298 (*People v. Vela* (2017) 396 P.3d 1093), and cause transferred on February 28, 2018, to the Court of Appeal, with directions to vacate and reconsider (*People v. Vela* (2018) 411 P.3d 526).

committed before its passage, provided there is no final judgment of conviction. (*Estrada, supra,* at p. 745; *Lara, supra,* at p. 307.) This is referred to as the *Estrada* rule, which "rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not."[4] (*People v. Conley* (2016) 63 Cal.4th at p. 657; see also *Lara, supra,* at p. 308; *Estrada, supra,* at pp. 744-745.)

The Supreme Court in *Estrada* explained that: "'A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. . . . As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.'" (*Estrada, supra,* 63 Cal.2d at pp. 745-746.)

In *Lara,* our high court extended the *Estrada* rule to Proposition 57, holding that the *Estrada* rule applied to defendant Lara's case, in which Lara was charged in adult court before Proposition 57 took effect. The court noted that *Estrada, supra,* 63 Cal.2d 740 was not directly on point because Proposition 57 does not reduce the punishment for a crime. (*Lara, supra,* 4 Cal.5th at pp. 303-304, 309.) However, Proposition 57 benefits

[4] The Supreme Court noted in *Lara* that "[w]e have occasionally referred to *Estrada* as reflecting a 'presumption.' [Citations.] We meant this to convey that ordinarily it is reasonable to infer for purposes of statutory construction the Legislature intended a reduction in punishment to apply retroactively." (*Lara, supra,* 4 Cal.5th at p. 308, fn. 5.)

juveniles by eliminating the People's ability to file criminal charges against a juvenile directly in a court of criminal jurisdiction, rather than in juvenile court, which generally treats juveniles differently, with rehabilitation as the goal. (*Lara*, *supra*, at pp. 306-307, 313.) The *Lara* court therefore concluded that *Estrada*'s rationale applied. The court in *Lara* held that the *Estrada* inference of retroactivity applied, because Proposition 57 benefits juveniles who are prosecuted as adults, and Lara's judgment was not final when Proposition 57 took effect. (*Lara*, *supra*, at pp. 303-304, 309.)

Defendant argues that the *Estrada* rule applies to section 1001.36 and requires retroactive application because the statute benefits defendants who qualify for mental health diversion. But this does not end the matter. The Supreme Court in *Lara* states that the Legislature may "'choose to modify, limit, or entirely forbid the retroactive application of ameliorative criminal law amendments if it so chooses.' [Citation.] [*In re Estrada*, *supra*, 63 Cal.2d 740] 'does not govern when the statute at issue includes a "saving clause" providing that the amendment should be applied only prospectively.'" (*Lara*, *supra*, 4 Cal.5th at p. 312, quoting *People v. Conley*, *supra*, 63 Cal.4th at p. 656.) Furthermore, the absence of an express savings clause requiring prospective application is not dispositive of the Legislative intent regarding retroactivity. (*People v. DeHoyos* (2018) 4 Cal.5th 594, 601; *People v. Conley*, *supra*, at pp. 656-657.) This court must therefore determine whether the language of section 1001.36 and the statute's legislative history refute an inference of retroactive application.

C. *Analysis*

Defendant contends that, because section 1001.36 applies retroactively under *Lara, supra,* 4 Cal.5th 299 and *Estrada, supra,* 63 Cal.2d 740, this court must reverse his judgment and remand the matter for a diversion hearing under section 1001.36. The People disagree, arguing section 1001.36 does not apply retroactively because the Legislature did not intend such application. The People reason that subdivision (c) expressly limits the application of section 1001.36 to cases which have not been adjudicated. The People argue that in all instances, including defendant's case, once a criminal proceeding has been adjudicated, postponement for diversion is no longer available under the plain language and intent of the statute. But nothing in the statutory language or legislative history of section 1001.36 clearly conveys that the Legislature intended that section 1001.36 shall not be applied retroactively.

Defendant cites the recent decision of *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*),[5] in support of the proposition that section 1001.36 applies retroactively to the instant case. (*Frahs, supra,* at p. 791.) The *Frahs* court concluded that section 1001.36 applies retroactively because "the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion [] 'apply to every case to which it

[5] The California Supreme Court granted review of *Frahs, supra,* 27 Cal.App.5th 784 on December 27, 2018, and denied depublication of *Frahs* pending review. (*People v. Frahs* (December 27, 2018, S252220) 2018 WL 7048230.) Under California Rules of Court rule 8.1115, *Frahs* "has no binding or precedential effect, and may be cited for potentially persuasive value only." (Cal. Rules of Court, rule 8.1115(e)(1), eff. July 1, 2016.)

constitutionally could apply.'" (*Frahs, supra*, at p. 791.) The People contend that *Frahs* was wrongly decided. We disagree.

In *Frahs*, a jury found defendant guilty on two counts of robbery. (*Frahs, supra*, 27 Cal.App.5th at p. 786.) While the defendant's case was pending on appeal, the Legislature enacted section 1001.36. (*Frahs, supra*, at p. 787.) The defendant argued on appeal that the mental health diversion program available under section 1001.36 should apply retroactively. (*Frahs, supra*, at p. 788.) The court in *Frahs* agreed and conditionally reversed the defendant's conviction and sentence. (*Id*. at pp. 787, 791-793.)

Relying on the retroactivity rationale articulated in *Estrada, supra*, 63 Cal.2d 740, the court in *Frahs* explained that, "Applying the reasoning of the Supreme Court, we infer that the Legislature 'must have intended' that the potential 'ameliorating benefits' of mental health diversion to 'apply to every case to which it constitutionally could apply.' ([See] *Estrada, supra*, 63 Cal.2d at pp. 744-746.) Further, [the defendant's] case is not yet final on appeal and the record affirmatively discloses that he appears to meet at least one of the threshold requirements (a diagnosed mental disorder). Therefore, we will direct the trial court on remand to make an eligibility determination regarding diversion under section 1001.36. [¶] The Attorney General argues that: "'Subdivision (c) of the statute defines "pretrial diversion" as the "postponement [of] prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication." This language indicates the Legislature did not intend to extend the potential benefits of . . . section 1001.36' as broadly as possible.

We disagree. *The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate.* Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all defendants whose convictions are not yet final on appeal. [¶] Here, although [the defendant's] case has technically been 'adjudicated' in the trial court, his case is not yet final on appeal. Thus, we will instruct the trial court—as nearly as possible—to retroactively apply the provisions of section 1001.36, as though the statute existed at the time [the defendant] was initially charged." (*Frahs*, *supra*, 27 Cal.App.5th at p. 791, italics added.)

We agree with, and adopt, the reasoning in *Frahs*, that *Estrada*, *supra*, 63 Cal.2d 740, requires retroactive application of section 1001.36, even though subdivision (c) of section 1001.36 defines "pretrial diversion" as a postponement of prosecution at any point from the accusation through adjudication. That language is insufficient to support a determination by this court that the Legislature intended that the ameliorative benefits of section 1001.36 not apply retroactively to cases where there has been an adjudication, but the conviction was not yet final when section 1001.36 took effect. As the court in *Estrada* explained, the ameliorative benefits of a new criminal statute such as section 1001.36 should be made available to all eligible criminal defendants whose convictions are not yet final. (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

The People contend that, even if section 1001.36 applies retroactively, defendant's judgment should be affirmed because defendant has not shown he would be eligible for mental health diversion under section 1001.36. We conclude, to the contrary, that remand is necessary to allow a diversion eligibility hearing under section 1001.36.

Section 1001.36 authorizes the trial court to grant pretrial mental health diversion if (1) a qualified mental health expert concludes the defendant suffers from a mental disorder, (2) the defendant's disorder played a significant role in the commission of the charged offense, (3) a qualified mental health expert concludes the defendant would respond to mental health treatment, (4) the defendant consents to diversion and waives his right to a speedy trial, (5) the defendant agrees to comply with treatment for the disorder as a condition of diversion, and (6) the defendant "will not pose an unreasonable risk of danger to public safety, as defined in [s]ection 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).)

Remand for a diversion hearing under section 1001.36 is required here because we cannot conclude based on the record that defendant is unable to demonstrate these eligibility factors. There is evidence defendant may suffer from mental disorders and that those disorders may have played a significant role in his charged crimes. In support of defendant's motion to strike his prior strikes, defendant submitted a 2016 report by a clinical and forensic psychologist. The report states that defendant was diagnosed with mental disorders. Because defendant may be able to establish on remand the requisite

factors for mental health diversion under section 1001.36, remand for a diversion eligibility hearing is appropriate.

While this court declines to make factual determinations as to whether defendant has sufficiently demonstrated any of the eligibility factors for mental health diversion under section 1001.36, we conclude there is sufficient evidence in the record to support remanding this matter for the trial court to conduct an eligibility hearing under section 1001.36. It is inappropriate for this court to speculate as to whether the trial court will find defendant eligible for mental health diversion. Remand is therefore necessary because we cannot say as, a matter of law, based on the record, that defendant is ineligible for mental health diversion under section 1001.36.

VIII.

DISPOSITION

The judgment is conditionally reversed, and the matter is remanded to the trial court with directions to conduct a diversion eligibility hearing under section 1001.36 within 90 days from the remittitur. If the trial court determines that defendant is eligible for diversion, the court should grant diversion and, if the defendant successfully completes diversion, defendant's charges should be dismissed. If, however, the trial court concludes that defendant is not eligible for diversion or defendant fails to complete diversion, his conviction and sentence shall be reinstated and the trial court is directed to exercise its discretion under SB 1393 to determine whether to strike one or more of defendant's prior serious felony enhancements pursuant to sections 667, subdivision (a)

and 1385, subdivision (b). The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

FIELDS
J.